IN THE

Supreme Court of the United States

October Term, 1964

No.....

FAIRFAX FAMILY FUND, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

STATEMENT AS TO JURISDICTION.

Opinions Below.

None of the opinions below is reported. The opinion of the District Court of Appeal (the court from which this appeal is taken) is printed in Appendix "A" *infra.* The opinion of the Superior Court (the trial court) is printed in Appendix "B" *infra.*

Jurisdiction.

1. *State Statute Held Valid Under Federal Constitution.* The ground upon which the jurisdiction of this Court is invoked is that there was drawn in question below the validity of a statute of the State of California upon the ground of its being repugnant to the Commerce Clause of the Constitution of the United States; and the decision of the highest court of the State in which a decision could be had was in favor of the validity of the statute.

2. *Application Of The Statute To Appellant.* The statute in question requires, as a condition of the right to engage in the business of making loans in amounts not exceeding $300.00, the obtaining of the State's license or permission and the payment of a license fee or tax. The proceeding had under the statute was to order appellant, by administrative fiat and thereafter by injunctive order of the courts below, to cease and desist, unless and until the license or permission of the State of California had been obtained, from carrying on its interstate business of soliciting persons resident or present in California to apply to appellant for and the making with the applicant of a loan contract in Kentucky, which business was carried on entirely by mail sent from Kentucky to the applicants in California and by the applicants to appellant in Kentucky. [See, pp. 4-5, *infra.*]

3. *The Appeal Is Timely.* The date of the judgment sought to be reviewed and of its entry was December 21, 1964. (The judgments, respectively, of the District Court of Appeal and the trial court, are printed in Appendix "C" *infra.*) A timely petition for a rehearing was filed. [*Petition For Rehearing, passim.**] It was denied on January 19, 1965. [*Order Denying Rehearing,* p. 1.] A timely petition for a hearing in the Supreme Court of the State of California after decision by a District Court of Appeal [*q.v.*] was filed. It was denied on February 17, 1965. [*Order of Supreme Court of California Denying Hearing,* p. 1.] A notice

*The Certified Record prepared by the Clerk of the court below contains the various documents to which we refer in this brief. It is not consecutively numbered but the documents included in it retain their respective original pagination. The "Clerk's Transcript" is referred to by the abbreviation "Clk. Tr."

of appeal to the Supreme Court of the United States was filed in the District Court of Appeal on March 17, 1965.

4. *Jurisdiction Is Conferred.* The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. § 1257(2).

5. *The Cases Sustain The Jurisdiction.* Cases believed to sustain the jurisdiction are: The judgment is final: *Local No. 438 v. Curry,* 371 U.S. 542, 551; *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 72-74; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-384. It is directly appealable: *Standard Oil Co. of California v. Johnson,* 316 U.S. 481, 482-483; *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 289; *Bantam Books v. Sullivan,* 372 U.S. 58, 61(n.3); *Fleming v. Rhodes,* 331 U.S. 100, 103(n.4); *Poulos v. New Hampshire,* 345 U.S. 395, 402. The grounds upon which it is contended that the case is within the cases cited to sustain the jurisdiction are discussed at pages 6-11, *infra.*

6. *Statute Involved.* The state statute involved (the California Small Loan Law) will be found in the official edition in 1 California Statutes, 1951, c. 364, p. 1146. [*Cal. Financial Code,* Div. 10, beginning with section 24,000.] The statute is lengthy; its pertinent text is set forth in Appendix "D", *infra.*

Question Presented.

Is the Commerce Clause [art. I, sec. 8, cl. 3] of the Constitution of the United States violated by a statute of the State of California which, as applied to appellant, requires that appellant obtain the license or permission of the State of California and pay a license tax or fee to that State, as a condition of the right to en-

gage in the interstate business of soliciting persons resident or present in California, by mail sent from Kentucky to California, to make and mail back to Kentucky an application for, and the ensuing making in Kentucky of a loan contract with those applicants?

Statement of the Case.

1. *The Facts.* Appellant Fairfax Family Fund, Inc. (hereinafter referred to as "Fairfax") is a Kentucky corporation engaged in the mail-order small loan business. It does no business and has no offices, agents, employees or property in California; and has never qualified to do business there. It is licensed in Kentucky to do and does a general small-loan business.[1] [Clk. Tr. p. 1, line 30, to p. 2, line 4; p. 15, line 30, p. 16, line 11; p. 19, line 26, to p. 20, line 8; p. 21, line 23, to p. 22, line 3.] Its only contact with California arises out of solicitation via the mails of loan applications from people in California. The soliciting correspondence is prepared by Fairfax in Kentucky, from where it is mailed to persons in California whose names have been taken from lists of potential mail-order customers obtained by Fairfax from other concerns located outside California. A printed form of application is enclosed with the solicitation. It is returned, by those addressees who are desirous of effecting a loan, to Fairfax's offices in Kentucky. There a credit report is gotten from

[1]The Kentucky statute [*Kentucky Revised Statutes,* ch. 288] under which it is licensed is, like the California Small Loan Law, based upon and substantially a copy of the Uniform Small Loan Law drafted by the Russell Sage Foundation. [*Small Loan Laws,* Educ. Pamphlet No. 2 (Bureau of Bus. Research, Western Reserve Univ., 13th ed. 1961) pp. 2-3, 8, 9.] It expressly authorizes licensees under it to engage in the lending business by mail. [*Kentucky Revised Statutes,* sec. 288.470(2).]

one of two concerns who act as independent contractors. One of these concerns has offices in California. Fairfax officers in Kentucky pass upon the application. If accepted, a check is mailed to the borrower from Kentucky. Payments on account of the loan are mailed by the borrower to Fairfax in Kentucky. Fairfax does nothing else in or in relation to California. [Clk. Tr. p. 15, line 30, to p. 16, line 18; p. 17, lines 21-31; p. 19, line 26, to p. 21, line 27; p. 23, line 22, to p. 25, line 8.]

2. *The Proceedings Had Under The Statute.* On March 21, 1963, without notice to or hearing of Fairfax, the California Commissioner of Corporations, acting under section 24607 of the Small Loan Law [1 *California Statutes,* 1951, c. 364, p. 1155, *Cal. Financial Code,* sec. 24607], issued an order commanding Fairfax to stop soliciting or making loans in California, the expressed and only ground of the order being that Fairfax was not licensed under the California Small Loan Law. Fairfax did not stop; and the instant action was commenced by the State. [Clk. Tr. p. 3, lines 14-27; p. 6 (Ex. "B"); p. 17, lines 8-12; p. 1, lines 1-16.]

3. *The Issue Involved Below.* In this action the facts just set forth above were alleged by appellee in its Complaint and admitted by Fairfax in its Answer.[2]

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[2]The specific allegations of facts relating to Fairfax's method of doing business were not denied [see, Clk. Tr., pp. 1-3 (pars. II-IV); 15-16 (pars. II-IV)], but only the conclusions of law. An allegation of a conclusion of law tenders no issue. [*Callahan v. Broderick,* 124 Cal. 80, 83, 56 Pac. 782, 783.] The facts, therefore, were *conclusively* admitted for all purposes in the case and were not subject to contradiction or limitation by either party. [*Cal. Code of Civil Procedure,* sec. 462; *Brown v. Aguilar,* 202 Cal. 143, 149, 259 Pac. 735, 738; *Fuentes v.*

[Clk. Tr., pp. 1-3; 15-17.] The prayer of the Complaint was for an injunction prohibiting Fairfax "from engaging in the business of soliciting, negotiating or making, directly or indirectly, by mail or otherwise . . . loans of money, goods or things in action, in the amount of or of the value of $300 or less . . ." and from making any credit investigation report relative to such a loan "to a person residing in or situated in California, or from advertising such loans, or doing any act in California in furtherance of the aforementioned acts, unless and until a Small Loan License is obtained in compliance with Financial Code section 24200." [Clk. Tr., p. 3, line 28, to p. 4, line 15.]

The only defense pleaded by Fairfax was that the licensing provisions of the California Small Loan Law, as applied to Fairfax to require it to obtain California's license and to pay a license tax as a condition of engagement in its interstate lending business, were repugnant to the Commerce Clause of the Constitution of the United States. [Clk. Tr. p. 16, lines 3-11; p. 16, line 24, to p. 18, line 15.] By reason of that state of the record, decision of the constitutional question was and had to be dispositive of the case as a whole, as the conclusively admitted facts [see, note 2, p. 5, *supra*] established a violation of the statute if it was constitutional; and its unconstitutionality was the only defense raised by Fairfax. [See, pp. 7-9, *infra.*]

Tucker, 31 Cal. 2d 1, 4-5, 187 P. 2d 752, 754-755.] In addition, the facts in this regard were averred in elaborate detail in affidavits or declarations filed by Fairfax and not denied in any way by appellee. [Clk. Tr., pp. 19-25.] These averments would be receivable as evidence against Fairfax as its admissions. [McCormick, *Evidence* (1954), sec. 239, p. 502 ff; Wigmore, *Evidence* (3d ed.) vol. IV, sec. 1048, p. 2, *ff; Hall v. The Bark "Emily Banning,"* 33 Cal. 522, 525.]

A motion for a preliminary injunction co-extensive with the prayer was made and, over the opposition of Fairfax on the constitutional ground pleaded in its defense, was granted. [Clk. Tr. pp. 15-25, 30-32.] In granting the motion the trial court filed an opinion in which the constitutional question was discussed and decided adversely to Fairfax. The preliminary injunction was issued as prayed for by appellee. [Clk. Tr. pp. 15-32.]

Fairfax appealed from that determination of the matter. [Clk. Tr. p. 33.] In due course its appeal was heard by the State District Court of Appeal for the Second Appellate District. In an opinion discussing and deciding the only question raised or involved in the case, *i.e.,* constitutionality *vel non* of the Small Loan Law as applied to Fairfax, that Court affirmed. A petition for hearing by the State Supreme Court was denied.[3] The appeal to this Court then followed.

4. *The Federal Question Was Timely Raised.* The federal question here sought to be reviewed was raised by Fairfax at the first available opportunity in the trial court, *i.e.,* by appropriate averment in its Answer, the first pleading filed by it in the cause. [Clk. Tr. p. 16, lines 3-11; p. 16, line 24, to p. 18, line 15.] Those averments were, in summary, that Fairfax did nothing in California but an interstate mail-order lending business, so that to require it to get California's license or permission to engage in that business would be a direct burden upon and an attempt to regulate and control interstate commerce in violation of clause 3

[3]The District Court of Appeal, therefore, was the highest court of the State in which decision could be had. [*Michigan-Wisconsin Pipe Line Co. v. Calvert,* 341 U.S. 157, 159-160.]

of section 8 of article I of the Constitution of the United States; to apply the California Small Loan Law to exact such a requirement of Fairfax would make the statute invalid as repugnant to the cited clause of the Constitution. [Clk. Tr. p. 16, lines 4-11, 24-29; p. 16, line 21, to p. 18, line 8.]

The trial court entertained and decided that question in favor of the validity of the statute, holding it to be a constitutionally permissible regulation of interstate commerce. Accordingly, it granted the injunction sought, thus prohibiting Fairfax from engaging in its business unless it procured a California license.[4] [Clk. Tr. pp. 26-32.]

Just as was true in the trial court, the determinative question raised on the appeal to the District Court of Appeal was that of the validity of the California Small Loan Law under the Commerce Clause of the Federal Constitution. There, too, it was Fairfax's contention that the statute as applied to require the State's license or permission as a condition of engaging in its interstate lending business was an unconstitutional invasion of the Commerce power. [*Appellant's Opening Brief*, pp. 1-4, 9-26.[5]] That Court too entertained and decided

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[4]If the necessary effect of a court's ruling is to deny the claim of invalidity, as it obviously was here, a decision in favor of validity has been made even though there may have been no express statement to the effect by the court. [*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67.]

[5]In California questions are raised on appeal by presentation and argument in the briefs. Assignments of error or similar procedural devices for putting a question in issue on appeal do not exist. [*Epperson v. Rosemond*, 100 Cal. App. 2d 344, 347, 224 P. 2d 480; *California Portland Cement Co. v. Boone*, 181 Cal. 35, 43, 183 Pac. 447, 450-451; *Grayson v. Grayson*, 132 Cal. App. 2d 471, 282 P. 2d 565.]

A question of statutory construction — *i.e.*, that the statute should be interpreted as inapplicable to foreign corporations whose

the question by holding the licensing requirement not to be a burden upon or interference with interstate commerce; therefore, it affirmed the order appealed from. [Appendix "A," pp. 3-7, *infra;* Appendix "B," pp. 9-10, *infra.*] The petition for hearing in the Supreme Court was similarly directed solely to the question of constitutionality. [*Petition For Hearing,* pp. 1-3.] It was denied without opinion. [*Order of Supreme Court of California Denying Hearing,* p. 1.]

The unconstitutionality of the statute was the only defense pleaded. All the facts bearing on that defense were before the State courts in this cause; and appellant has nothing further in that regard to present at any other proceeding that may be had in it.

5. *The Judgment Below Is Final.* Considered from the whole record, rather than only the "face of the judgment" [see, *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547; *Local No. 438 v. Curry, supra,* 371 U.S. at 551] the judgment sought to be reviewed is a final one. It is that because the federal question is the dispositive and only question in the case. So, in that state of the record, and having regard to the conclusive admissions of fact made by Fairfax [see, note 2, p. 5, *supra*], and the concession of an absence of any other or different facts bearing upon the federal question, which appellant has made in this Statement, the instant decision of that question has foreclosed it and, as well, the ultimate result of the case in the State courts, leaving nothing more to be decided. [*Pope v. Atlantic Coast Line R. Co., supra,* 345 U.S. at 381-383; *Local No. 438*

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only contact with California was interstate commerce — was raised, but none of the courts below entertained or decided it. [*Appellant's Opening Brief,* pp. 38-41.]

v. Curry, supra, 371 U.S. at 550-552; *Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 72-74.]

The decision of the District Court of Appeal in the California practice establishes the "law of the case." On the same or substantially similar facts in any further proceeding in the cause, all State courts, appellate as well as lower, are bound to reach the same result. [*Tully v. Ganahl,* 151 Cal. 418, 421, 90 Pac. 1049, 1050; *Pigeon Point Ranch v. Perot,* 59 Cal. 2d 227, 230-232, 379 P. 2d 321, 322-323, 28 Cal. Rptr. 865, 866-867; *Berry v. Maywood Mut. W. Co.,* 13 Cal. 2d 185, 186, 88 P. 2d 705, 706; *Pellett v. Sonotone Corp.,* 26 Cal. 2d 705, 708, 160 P. 2d 783, 785.] The facts have been conclusively admitted. [Note 2, p. 5, *supra.*] They have, therefore, at least the force and legal effect of a stipulation of fact. [*Cf., Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 73.] And it is conceded that all the facts relating to the constitutional issue were before the courts below. [See p. 9, *supra.*] No other defense has been pleaded. No other defense or issue may be raised or decided. On the whole record, therefore, it is plain that for all practical purposes the case has been decided. Paraphrasing this Court's language in *Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 73-74, "the facts have been [conclusively admitted] and the [highest court of the State] has passed on the issues which control the litigation . . . there is nothing more to be decided."

On remand from the District Court of Appeal, entry of a judgment for a permanent injunction would be a pure formality, as the conclusively admitted facts and the law of the case in respect of the Federal question established by the decision sought to be reviewed would

compel the result. In view of the pleaded admissions of fact, taking of evidence on the subject would not be necessary or permissible. [See note 2, p. 5, *supra.*] Review of that judgment in the State appellate courts too would be merely a formal proceeding; only the same question of law already decided in the cause would be before them. [See, pp. 6-7, 8-9, 10, *supra.*] Yet, that procedure in the trial and appellate courts—including an application for a hearing in the State Supreme Court, which has already refused to review the question — would have to be pursued before that question, which is already ripe for adjudication, could be brought to this Court.[6] We are not aware of any procedure in the State practice by which appellant could avoid going once again through the hierarchy of State courts and still bring the cause to the condition it is right now—ready for final review by this Court.

Substantiality of the Question.

1. *The Judgment Is Not In Accord With The Applicable Decisions Of This Court.* The result reached below is out of line with the decisions of this Court in at least three respects.

First: In an unbroken line of decision [see the numerous cases cited in *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 392(n.7)] this Court has "repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce . . ." [*Crutcher v.*

[6]Until it has declined to hear the case the Supreme Court is the highest court in the State to which the question could be taken, so it could not be by-passed without precluding review in this Court. [See, 28 U.S.C., §1257; and note 3, p. 7, *supra.* Also, *Great Western Tel. Co. v. Burnham,* 162 U.S. 339, 342.]

Kentucky, 141 U.S. 47, 58.] When, as is our case, the trader's activities in a given State are solely interstate commerce the State cannot require "a certificate of authority to do business in the State." [*Lilly & Co. v. Sav-On-Drugs,* 366 U.S. 276, 278-279.] Solicitation of orders in a State, the orders being filled by shipments from another State to the buyer, was the activity involved and held interstate commerce in most of these cases. The fact of solicitation by mail from another State rather than by personal interview in the State does not make the instant case different. In any event, in *International Textbook Co. v. Pigg,* 217 U.S. 91, it was mail order solicitation virtually indistinguishable from that involved at bar that was held to be interstate commerce not subject to the State's license.

This doctrine is a product of history. To permit the States to determine who may engage in interstate commerce and upon what terms, would be to repeat the divisive experience suffered under the Articles of Confederation—an experience the repetition of which the Commerce Clause was designed to prevent.

The question is not whether the States may regulate the local incidents of interstate commerce in a way that does not unduly burden or discriminate against that commerce. Of course they may [see, *e.g., Breard v. Alexandria,* 341 U.S. 622, 638] and appellant has never argued to the contrary. The question, rather, is whether the States may arrogate to their own and disparate jurisdictions, power over a right that is federal in its provenance and control. The courts below in necessary effect have held that they may. The correctness of such a holding is, at the very least, a debatable one. Being that, it is a substantial question.

It is thus evident that the State courts have decided a federal question of substance "in a way probably not in accord with applicable decisions of this court." That would be a substantial ground for certiorari. [See, Rev. Rules, rule 19(b).] It is no less substantial because the mode of review is appeal rather than certiorari. This is not a case in which the decision below, being in accord with a settled line of decision from this Court, is not fairly debatable. [See, *Zucht v. King,* 260 U.S. 174, 176-177.] It is one in which it is at least fairly debatable that the settled doctrine has been ignored or misconceived.

Second: Appellee contends that *Robertson v. California,* 328 U.S. 440, opens up the right to engage in interstate commerce to the States' licensing power. Whether it does is itself a substantial question needing briefing and full consideration. *Robertson,* which involved regulation of the insurance business, cannot be considered alone. It must be read together with *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, decided the same day; and read as well in the light of the entire history of the development of the law in the field of insurance regulation. That development began with *Paul v. Virginia,* 8 Wall. 168, which held that the business of insurance was not interstate commerce. The result was that in the various states, and notwithstanding any multistate aspects of the business, complete and extensive systems of regulation and licensing grew up. The penultimate step was the overthrow of *Paul* by *United States v. Southeastern Underwriters Assn.,* 322 U.S. 533. The final step was congressional permission to the States, given in the McCarran-Ferguson Act [15 U.S.C., secs. 1011-1015], to continue to regulate and

license the insurance business as they had when it was believed not to be interstate commerce.

Careful analysis and consideration of that long and complex history will show that *Robertson* lays down no rule of general application, but only one tailored for temporary, emergency use in order to prevent regulatory chaos because of the absence of any Federal system of regulation and the threatened destructive impact of *United States v. Southeastern Underwriters Assn., supra,* 322 U.S. 533, upon the existing State systems. It bridged the gap between the *Southeastern* decision and the McCarran-Ferguson Act. Whether, in the light of that history, *Robertson* applies to cases such as the one at bar is certainly a fairly arguable and, therefore, a substantial question.

Third: The District Court of Appeal was of the view that because, under the doctrine of *International Shoe Co. v. Washington,* 326 U.S. 310, California courts could probably obtain personal jurisdiction over Fairfax, the State had power to impose the requirement of a license to engage in its interstate business. But this Court has shown that "minimal contacts" sufficient to subject one to the personal jurisdiction of a State's courts do not affect the exclusive power of the National government over entry into or engagement in interstate commerce. [*Nippert v. Richmond,* 327 U.S. 416.] Here, too, the correctness of lower court's reasoning and result is, at the very least, fairly debatable, thus emphasizing the substantiality of the question presented.

2. *The Decision Will Have A Substantial Impact Upon Local and National Economy.* Interstate commerce carried on by local solicitation of orders to be

filled by shipment from another State, and the doing of such business by mail and other interstate media of communication, is not a rare or unusual phenomenon. [See, pp. 15-16, *infra*. Also, 14 *Encyclopedia Britannica* (1964) 683; 18 *Encyclopedia Americana* (1959) 139.] A substantial portion of the trade of the nation is carried on by such methods. Obviously, the decision below is applicable to any mail-order business carried on between two or more states. If permitted to stand it will subject entry into and continuance in the business to the control of each State into which the business is projected from another.

Taking only retail trade into account, mail-order houses exist in every State of the Union, ranging in numbers from only a few to as many as several hundred in each of such States as New York, California and Illinois.[7] In 1958 there were 2550 such establishments in the nation, whose total sales amounted to $1,986,168,000 and annual payrolls to $272,398,000. In the twenty-five States for which the latest figures — 1963 — are now available[8] the number had increased

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[7]The data in the above paragraph are taken from U.S. Bureau of the Census, *U.S. Census of Business; 1958*. Vol. II, Parts 1 and 2, Table 2. (U.S. Govt. Print. Off., Washington, D. C., 1961); and, so far as available at this date, from the individual State pamphlets (Nos. BC63-RA1 to RA50) of the *Census of Business, 1963*. Retail Trade, Table 101. The 1963 pamphlets are not yet available for twenty-five States (among them California, Illinois, Michigan, New York, New Jersey and Pennsylvania). These twenty-five and the District of Columbia in 1958 had 1959 mail-order houses, or 77% of the nation's total.

[8]Figures from three of them, however, were withheld. A later compilation is found in *Survey of Current Business*, March, 1965, p. S-11, published by the U. S. Department of Commerce, Office of Business Economics. It shows that retail mail order houses selling department store merchandise did an average business of $195,000,000 per month in 1964 as compared with $177,000,000 in 1963; and a total for 1964 of $2,340,000,00.

in all but Hawaii. The total increase in 1963 over 1958 was 98.3%. "With the growth of the mail order business, numerous organizations [list-brokers, list-compilers, and letter shops] have been set up to meet the needs of mail order concerns." [18 *Encyclopedia Americana* (1959), 141.] These too contribute their due to local and the national economy.

A mail-order business carried on, as Fairfax's business is conducted, entirely by correspondence between the dealing parties located in different States is "in its essential characteristics, commerce among the States within the meaning of the Constitution . . ." [*International Textbook Co. v. Pigg, supra,* 217 U.S. at 106.] To erode the rule that keeps the right of entry into such business a matter of exclusive Federal jurisdiction must inevitably have widening repercussions throughout the entire economy. ". . . Such a state of things," as Mr. Chief Justice Marshall said in *Brown v. Maryland,* 12 Wheat. 419, 447, "would break up commerce . . ." The beginning of such a break-up as the consequence of State action precipitates a substantial question, the answer to which ought to be set aright by this Court.

3. *The Historic Dividing Line Between State and Federal Power Over Interstate Commerce is Erased By The Decision.* The courts below treated this case as one involving only police-power regulation of the local incidents of interstate commerce. [See, Appendix "A," pp. 3-7, and Appendix "B", pp. 9-10, *infra.*] This Court, however, has emphatically drawn a line between the permissibility of such regulation and the impermissibility of local control of the right to engage in the commerce at all. [*Breard v. Alexandria, supra,* 341 U.S. at 638; *Leisy v. Hardin,* 135 U.S. 100, 108, 125; *Edwards v.*

California, 314 U.S. 160, 173-174.] To concede the latter right to the States would mean necessarily to give them the right to exclude, as well as merely to condition. [*Sault Ste. Marie v. International Transit Co.,* 234 U.S. 333, 340; *Leloup v. Port of Mobile,* 127 U.S. 640, 645.] That, of course, is exactly the power that the Commerce Clause was designed to deny the States. [*Brown v. Maryland, supra,* 12 Wheat. at 445; *Gibbons v. Ogden,* 9 Wheat. 1, 195-196; *Baldwin v. Seeley,* 294 U.S. 511, 522-523; *Polar Ice Cream etc. Co. v. Andrews,* 375 U.S. 361, 374-375, 379.]

Properly to demark the line between permissible regulation and impermissible control is a matter to which something more than summary consideration ought to be devoted.

Conclusion.

A substantial question under the Constitution of the United States was seasonably raised below and there decided in a way contrary to the applicable decisions of this Court. In deciding that question the State courts stepped across the line that divides State from Federal power over interstate commerce. Probable jurisdiction should be noted, to the end that the cause may be heard on its merits and decided after briefing, argument and plenary consideration.

Respectfully submitted,

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